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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-1919

INTERCONTINENTAL TRANSPORTATION
SERVICES, LIMITED,
Petitioner,

vs.

MRS. HOWARD F. MCNEILL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The parties to the proceeding are: (1) Intercontinental Transportation Services, Limited; (2) Mrs. Howard F. McNeill; and (3) Midland Insurance Company.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Mrs. Howard F. McNeill, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the United States Court of Appeals for the Fifth Circuit's opinion in this case.

QUESTIONS PRESENTED

Contrary to Petitioner's recitation of questions presented for review, there is only one question presented to this Court, namely:

> Does the wife of a non-fatally injured longshoreman whose husband is subject to the Longshoremen and Harborworker's Act (33 U.S.C. 901 et seq., as amended 1972) have a cause of action for loss of consortium against the vessel upon which her husband was injured?

STATEMENT OF THE CASE

Respondent, Mrs. Howard F. McNeill, adopts the petitioner's statement of the case.

STATEMENT OF FACTS

Respondent, Mrs. Howard F. McNeill, adopts the petitioner's statement of facts.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither the decision below nor the record raises the questions presented in the petition save the one question noted in this response.

The only question presented in this case has already been answered. In American Export Lines, Inc. v. Alvez, 446 U.S. 274, 100 S.Ct. 1673, 64 L.Ed 2d 284 at 287 (1980), this Court said:

> "The question in this case is whether general maritime law authorizes the wife of a harbor worker injured non-fatally aboard a vessel in state territorial waters to maintain an action for damages for the loss of her husband's society." at P. 287.

And the Court responded:

> "We conclude that general maritime law does afford the wife such a cause of action." at P. 287.

This Court made no distinction between the pre or past Longshoreman and

Harborworker's Amendments because under the aforesaid ruling there was no reason to do so. The recovery was granted under general maritime law!

2. Alvez is also dispositive because it was grounded upon the theory of negligence as is this post amendment case.

The argument of the petitioner wishes to forget that Alvez, supra, was based upon the grounds of negligence and unseaworthiness - not, as argues, unseaworthiness alone! Petitioner is attempting to develop a "strawman" easy to knock down with the misplaced argument that the 1972 amendments to the Longshoremen and Harborworker's Compensation Act (33 U.S.C., Sec. 905(b), did away with the right of recovery by a longshoreman against a vessel based upon warranty

of unseaworthiness. This argument is irrelevant and immaterial to this case because the action below was not grounded for recovery on unseaworthiness but negligence! See: Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1288 (5th Cir. 1977); Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884 (5th Cir. 1978).

3. The landmark thrust of the 1972 Amendments of the Longshoremen & Harborworker's Act further support the cause of action of Mrs. McNeill.

From the teachings of Alvez, we know that there is a cause of action available to the plaintiff for loss of consortium as a result of a non-fatal injury to her longshoreman husband under general maritime law but there are other theories as well. Skidmore

v. Grueninger, 506 F.2d 716 (5th Cir. 1975), compare Moragne v. States Marine Lines, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970); Sealand Services, Inc. v. Gaudet, 414 U.S. 573, 95 S.Ct. 806, 39 L.Ed.2d 9 (1974).

In 1972, with the amendment of the Longshoremen & Harborworker's Compensation Act (LHWCA), 33 U.S.C., Sec. 901, et seq., the "Ancient Mariner" came landward and claimed the benefits of Restatement (Second) of Torts, Sec. 342 (1965) rather than the sea doctrine of "unseaworthiness". See: Gay v. Ocean Transport & Trading, Ltd., supra; Samuels v. Empresa Lineas Maritimas Argentinas, supra. Landward, the doctrine of loss of consortium is as well known (Miss. Code Ann., Sec. 93-3-1 (1972), Tribble v. Gregory, 288 So.2d 13 (Miss. 1974), as it is seaward. To quote Gaudet:

> "In fact, since the 17th Century, juries have assessed damages for loss of consortium--which encompasses loss of society--in civil actions brought by husbands whose wives have been negligently injured. More recently, juries have been asked to measure loss of consortium suffered by wives whose husbands have been negligently harmed." 39 L.Ed.2d 24.

The landward thrust of the 1972 amendments left longshoremen with not only land remedies but with all those remedies because the courts are:

> ". . . Compelled. . .to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction." Gaudet, supra, at 23.

And for the further reason that "no statutory language or 'established and inflexible rules' of maritime law require a contrary conclusion." Gaudet, supra, at 20. See: Pesce v. Summa Corp., 54 Cal.App.3d, 86, 126 Cal. Rptr. 451 (1975).

In the cause sub judice, Mr. McNeill under the teachings of Gay, supra, and Samuels, supra, would have to proceed under the Restatement (Second) of Torts, Sec. 342 (1965). The section has been adopted in the State of Mississippi. See: McDonald v. Wilmut Gas & Oil Co., 180 Miss. 350, 176 So. 395 (1937); Marlon Investment v. Conner, 246 Miss. 343, 149 So.2d 312 (1963). Given the same facts as here, Mrs. McNeill would likewise have a cause of action under Miss. Code Ann. Sec. 93-3-1 (1972) which states in part: "A married woman shall have a cause of action for loss of consortium through negligent injury of her husband." See also: Tribble v. Gregory, supra. Under the general maritime law, she has the same cause of action for the reasons stated.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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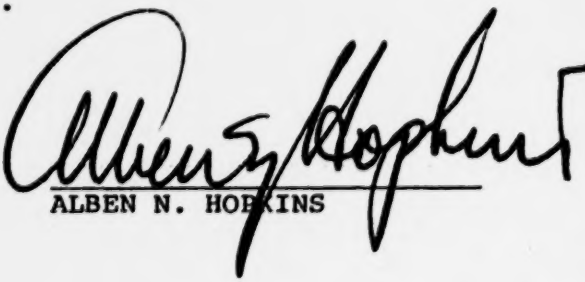
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari has been served upon counsel for all parties to this proceeding, by mailing the same to each by First Class United States Mail, properly addressed, and postage prepaid on this, the 21 day of August, 1981.



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